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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061215
Party	Plaintiff Schiedmayer Celesta GMBH
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Submission	Motion to Amend Pleading/Amended Pleading
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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

Schiedmayer Celesta GmbH,)
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v)
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Piano Factory Group, Inc.,)
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Cancellation No. 92/061,215
Reg. No. 3,340,759
Mark: SCHIEDMAYER
Registration Date: 11/20/2007

**MOTION FOR LEAVE TO FILE FIRST AMENDED
PETITION FOR CANCELLATION PURSUANT TO RULE 15(a)
OF THE FEDERAL RULES OF CIVIL PROCEDURE; 37 CFR 2.115 AND TBMP §507**

January 5, 2016

Petitioner, Schiedmayer Celesta GmbH, hereby moves for leave to amend its Petition for Cancellation. As grounds therefore, Petitioner states the following:

This is a petition to cancel U.S. Trademark Registration No. 3,340,759 owned by Respondent, Piano Factory Group, Inc., for the mark SCHIEDMAYER for pianos, namely, grand pianos, upright pianos and digital pianos.

The said trademark registration, No. 3,340,759, issued on November 20, 2007. The registration is therefore over five years and a declaration under Sections 8 and 15 was filed and accepted.

The Petitioner is Schiedmayer Celesta GmbH, a German company which long prior to any use or registration by Respondent has used the trademark SCHIEDMAYER relative to keyboard musical instruments, namely, a celesta, which is a piano type keyboard instrument.

This Petition for Cancellation is in its early stages. Neither party has taken any depositions and several months remain in the discovery period. To date, Respondent has not taken any discovery.

On December 29, 2015, Piano Factory Group, Inc. responded to a Request for Production of Documents and two sets of Interrogatories. From the responses, it is evident to Petitioner that Respondent has in fact never offered for sale or sold Schiedmayer pianos of any type, notwithstanding their filing of a Declaration of Use under Sections 8 and 15.

Petitioner now seeks to add a claim of abandonment. Additionally, in view of the responses received, Petitioner now seeks to add a claim of misrepresentation as to the source of the goods in connection with which the mark may be used.

All of the above claims are permissible and legitimate and are made at a very early stage of this proceeding.

ARGUMENT

Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend shall be freely given when justice requires.

“Leave to amend a complaint should be freely given...”
Richardson v United States, 193 F.3(d) 545, 548-49 (DC Cir 1999)

The United States Supreme Court has declared that “this mandate is to be heeded.”
Foman v Davis, 371 U.S. 178, 182 (1962)

Therein, the Supreme Court explained that “...if the underlying facts or circumstances relied upon by plaintiff may be a proper source of relief; he ought to be afforded an opportunity to test his claim on the merits.”

There has been no undue delay, no bad faith and no dilatory motive in the preparation and filing of the First Amended Petition for Cancellation.

A copy of the proposed First Amended Petition for Cancellation is attached hereto.

It is requested that proceedings be suspended pending the outcome of this motion.

In view of all of the above, leave to amend the Petition for Cancellation is respectfully requested.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MJS', with a long horizontal flourish extending to the right.

Michael J. Striker
Attorney for Petitioner
Reg. No.: 27233
103 East Neck Road
Huntington, New York 11743

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL & APPEAL BOARD

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Cancellation No. 92/061,215
Reg. No. 3,340,759
Mark: SCHIEDMAYER
Registration Date: 11/20/2007

**FIRST AMENDED PETITION FOR CANCELLATION OF
U.S. TRADEMARK REGISTRATION NO. 3,340,759**

January 5, 2016

Petitioner, Schiedmayer Celesta GmbH (Schiedmayer), herewith petitions to cancel U.S. Trademark Registration No. 3,340,759 for mark SCHIEDMAYER owned by Piano Factory Group, Inc. (Piano Factory) and registered on November 20, 2007.

The basis of this Petition for Cancellation is fraud in the acquisition and maintenance of the subject registration; abandonment and that the registered is mark is being used so as to misrepresent the source of the goods in connection with which the mark is being used.

In support of this Petition, Schiedmayer hereby alleges as follows:

1. Schiedmayer Celesta GmbH is a Limited Liability Company organized under the laws of the Country of Germany and having offices in Wendlingen, Germany.

2. Upon information and belief, Piano Factory is a California corporation having offices in Burbank, California.

3. Upon information and belief, Piano Factory, the registrant herein, is engaged in the business of offering for sale pianos.

4. For many years, and long prior to any use or registration or filing of the trademark SCHIEDMAYER by Piano Factory, Schiedmayer and its predecessors in interest have manufactured and sold Schiedmayer keyboard instruments, representing some of the most coveted and respected keyboard musical instruments in the world.

5. For many years, and long prior to any use or registration by Piano Factory, Schiedmayer has manufactured and offered for sale the celesta piano, which is a piano keyboard instrument having four or five octaves and in which a plate is struck rather than a wire to create sound.

6. Schiedmayer keyboard musical instruments represent the highest degree of quality and reputation. Schiedmayer keyboard musical instruments have

been sold to and are used by numerous symphonies and orchestra throughout the United States, by way of the following examples:

Boston Symphony, Washington National Symphony, San Francisco Symphony, New York Philharmonic Orchestra, Florida Philharmonic Orchestra, St. Louis Symphony Orchestra, Chicago Symphony Orchestra, Memphis Orchestra, Philadelphia Orchestra and several others.

7. Schiedmayer currently and long prior to any use or registration by Piano Factory, offers for sale and has sold within the United States, Schiedmayer marked keyboard instruments. Among recent purchasers are the following:

Chicago Symphony Orchestra, Detroit Symphony Orchestra, New York Philharmonic, Cleveland Orchestra, New York University, Pittsburg Orchestra, Paul Simon, Arkansas Symphony Orchestra, Cincinnati Symphony and Pops Orchestra.

8. Piano Factory has never had any relationship whatsoever with Schiedmayer.

COUNT I - FRAUD

9. On August 24, 2002, Piano Factory falsely, fraudulently and intentionally represented to the United States Patent Office that it was the owner of the trademark SCHIEDMAYER for pianos, namely, digital pianos, upright pianos and grand pianos. Piano Factory falsely, fraudulently and with deliberate intent never informed the

United States Patent and Trademark Examiner that in fact Schiedmayer was actively involved in the manufacture and sale of celesta keyboard musical instruments.

10. On or about November 20, 2013, Piano Factory falsely, fraudulently and with deliberate intent caused to be filed a Declaration of Use under Sections 8 and 15 which falsely, fraudulently and intentionally represented to the United States Patent and Trademark Office that it had continued to use the trademark SCHIEDMAYER and had done so continuously for the five years next preceding the filing of the Declaration of Use, for pianos, including upright pianos, grand pianos and digital pianos. Said representations were intentionally false and fraudulent in as much as Piano Factory never had any relationship with the Schiedmayer product and has not offered for sale or sold a Schiedmayer product continuously within the five years next preceding the filing of the Declaration of Use. The filing of said Declaration of Use was intentionally false and fraudulent because in fact no continuous sales by Piano Factory of Schiedmayer pianos of any type had taken place within the said five-year time span.

11. The deliberately intentionally false and fraudulent maintaining of the trademark SCHIEDMAYER by the Piano Factory is damaging to Schiedmayer. Schiedmayer has filed a U.S. Trademark Application for the mark SCHIEDMAYER which has been refused in view of the registration sought to be cancelled herein. Purchasers and potential purchasers are being falsely and fraudulently led to believe that some relationship exists between Piano Factory and the coveted and highly respected Schiedmayer keyboard instruments. Schiedmayer is further being damaged

in view of the fact that the trademark SCHIEDMAYER is the rightful property of Schiedmayer and Piano Factory has wrongfully appropriated its rightful property. A celesta is a keyboard musical instrument similar to and likely to be confused with a piano. Consumers and potential consumers are likely to believe that a piano and a celesta keyboard musical instrument emanate from the same source.

COUNT II – FALSE ASSOCIATION

12. As correctly stated by Examiner Darlene D. Johnson during the prosecution of U.S. Trademark Application Serial No. 78/157,552, which is the trademark application leading to the registration which Schiedmayer seeks to cancel herein:

“The examining attorney refuses registration because the mark consists of or comprises matter which may falsely suggest a connection with Schiedmayer. Mr. Schiedmayer was a famous maker of pianos. Additionally, pianos are currently being made under the method previously used by Schiedmayer and carry his name and the SCHIEDMAYER trademark; as such applicant’s mark suggests a false connection with the pianos previously and currently manufactured under the trademark SCHIEDMAYER.”

13. In response thereto, Piano Factory represented that the Schiedmayer Piano Company was no longer in business. Piano Factory never informed the Examiner of the existence of Schiedmayer Celesta GmbH, the Petitioner herein, which had long before manufactured and sold piano keyboard instruments in the United States. Any consumer or potential consumer seeing a Schiedmayer piano product in

the marketplace or being offered for sale will assume that it emanates from Schiedmayer, the petitioner herein.

14. Any sale or offering for sale by Piano Factory of a Schiedmayer piano will result in a misrepresentation as to the source of the goods in connection with which the mark is used. Consumers and potential consumers and anyone seeing a Schiedmayer marked piano, will assume that the source of the goods is from Schiedmayer, the manufacturer of keyboard musical instruments. Therefore, a misrepresentation as to the source of the goods in connection with which the mark is used is taking place. A celesta is a keyboard musical instrument similar to and likely to be confused with a piano. Consumers and potential consumers are likely to believe that a piano and a celesta keyboard musical instrument emanate from the same source.

15. Schiedmayer is and will be damaged by any sale or any offering for sale of Schiedmayer marked pianos by Piano Factory since there will exist a misrepresentation as to the source of the goods involved. The inferior quality of a Piano Factory Schiedmayer product will damage the reputation of the authentic Schiedmayer keyboard musical instrument, all to the damage of Schiedmayer.

COUNT III – ABANDONMENT

16. Upon information and belief, Piano Factory has not sold a Schiedmayer marked digital piano in commerce in the United States.

17. Upon information and belief, Piano Factory has not sold a Schiedmayer marked upright piano in commerce in the United States.

18. Upon information and belief, Piano Factory has not sold a Schiedmayer marked grand piano in commerce in the United States.

14. Piano Factory has abandoned the trademark SCHIEDMAYER and in view thereof, the subject trademark registration should be cancelled in all respects.

15. Piano Factory has abandoned the trademark SCHIEDMAYER in view of its non-use of the mark SCHIEDMAYER and with no shown intent to establish use of the mark.

16. Petitioner is damaged by the maintenance of a trademark registration for the mark Schiedmayer which in fact has become abandoned as the mark is the rightful property of Petitioner. Petitioner is further damaged because the said abandoned trademark registration is being cited against Petitioner in its pending trademark application for the mark Schiedmayer. A celesta is a keyboard musical instrument similar to and likely to be confused with a piano. Consumers and potential

consumers are likely to believe that a piano and a celesta keyboard musical instrument emanate from the same source.

In view of all of the above, favorable consideration of this Petition for Cancellation and cancellation of the subject trademark registration is respectfully requested.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Striker', with a long horizontal flourish extending to the right.

Michael J. Striker
Attorney for Petitioner
Reg. No.: 27233
103 East Neck Road
Huntington, New York 11743

CERTIFICATE OF SERVICE

It is hereby certified that a true and complete copy of the attached Motion For Leave to File Amended Petition for Cancellation and Proposed Amended Petition was served upon counsel for the Registrant by first class mail and email as follows:

Adam R. Stephenson

40 Baseline Road

Tempe, Arizona

85283

adam@patentproblempro.com

This 7th day of January, 2016

A handwritten signature in black ink, appearing to read 'Michael Striker', is written over a horizontal line.

Michael Striker